

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 10656 OF 2015

Ramnath S/o Karbhari Helade,
Age: 40 years, Occu: Agri.,
R/o. Helade Wasti, Jakhmatha,
Tq. Gangapur, Dist. Aurangabad

..PETITIONER
(Orig.plaintiff)

VERSUS

1. Yogesh S/o Ramchandra Kunde,
Age: 27 years, Occu: Agri.,
R/o. Behind Police Station,
Near Bazar Tal,
Gangapur, Dist. Aurangabad
2. Smt. Bharti S/o Ramchandra Kunde,
Age: 50 years, Occu: House Hold, & Agri.,
R/o. Behind Police Station, Near Bazar Tal,
Gangapur, Dist. Aurangabad

..RESPONDENTS

Mr C. R. Thorat, Advocate for petitioner;
Ms Poonam Bodke, Advocate for respondent No. 1 and 2

CORAM : N.W. SAMBRE, J.

DATE : 9th December, 2015

ORAL ORDER :

The defendant to the suit for possession of 10 Gunthas out of portion of 7 acres and 10 Gunthas, in relation to land bearing survey no.48/2A of village Jakhmatha, Taluka Gangapur, moved an application under Order XXVI, Rule 9 of the Code of Civil Procedure, for appointment of Court Commissioner vide Exh.45, which came to be rejected by the order dated 7th August, 2015, passed by Joint Civil Judge Junior Division, Gangapur. Thus, the present petition.

(2)

2. The petitioner-defendant would urge that the nature of the claim in the suit is in relation to removal of encroachment and possession of 10 Gunthas of land from the suit property. He would then urge that for ascertaining the encroachment and possession, the measurement of the suit property is very much necessary and as such, according to him, the application for appointment of Court Commissioner ought to have been granted, so as to ascertain holding of each of the parties *qua* the survey numbers.

3. The claim is opposed by the learned Counsel appearing on behalf of the respondents on the ground that the application is premature and this is second time such an application is moved by the petitioner-defendant. According to him, before filing the suit in 2010, already there was measurement of the land. She would then urge that if based on 2010 measurement, the Taluka Inspector of Land Records is unable to depose, then only a cause would arise to the petitioner, to move such an application.

4. Having bestowed my thought to the respective submissions, it is required to be noted that the suit is for possession of 10 Gunthas land by the respondents against the petitioner. While determining the issue, exact measurement of the land and possession of the parties on their respective area, is relevant evidence.

(3)

5. The ascertainment of possession of each of the parties on an area cannot be termed as intention to collect evidence.

6. In the above referred background, as application Exh.45 ought to have been granted by the learned Trial Court, except clause (b) i.e. direction of flow of water in water channel. I, therefore, pass following order :-

The order dated 7th August, 2015, passed by Joint Civil Judge Junior Division, Gangapur, below Exh.45, in Regular Civil Suit No.245 of 2010, is quashed and set aside.

Application Exh.45 stands allowed in terms of clause (a) and (c) thereof.

Writ Petition stands allowed in above terms with no order as to costs.

(N.W. SAMBRE, J.)

amj